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2017 Environmental and Energy Law Forecast

PENNSYLVANIA FORECAST

PA Supreme Court Will Focus on the Natural Gas Industry in 2017

Diana A. Silva, Esq.

There are three cases pending before the Pennsylvania Supreme Court that, when decided, may have broad implications for the development of natural gas infrastructure in the Pennsylvania's Marcellus Shale region. Each of these cases will be closely watched by both the regulated community and environmental advocacy groups, and will likely shape the legal framework for Pennsylvania's natural gas industry for years to come.

The first case – *Marcellus Shale Coalition v. PADEP*, Dkt. Nos. 115-MAP-2016 and 573-MD-2016 – challenges the recent promulgation by the Pennsylvania Department of Environmental Protection (“PADEP”) of regulations for hydraulic fracturing operations, known as the Chapter 78(a) rules. The Coalition argued that certain of the new regulations are beyond the scope of PADEP’s regulatory authority, and filed a complaint for declaratory and injunctive relief, including a request for a preliminary injunction to stay certain portions of the new regulations from taking effect during the pendency of the appeal. In November 2016, the Pennsylvania Commonwealth Court granted the Coalition’s request for a preliminary injunction and barred the immediate applicability of four of the challenged regulatory provisions, including: (1) a requirement that drillers notify local schools, playgrounds, municipalities, and water supplies of the construction of nearby gas wells; (2) a requirement that drillers identify and monitor old wells located near a proposed new-well location, even when the old wells are not under the drillers’ ownership or control; (3) requirements for upgrades to previously-constructed freshwater impoundments; and (4) heightened requirements for remediation of drilling sites. As the challenge on the merits of the regulations continues before the Commonwealth Court, PADEP appealed the preliminary injunction to the Pennsylvania Supreme Court. The outcome of both appeals will be important for shaping the law on agency regulatory authority in Pennsylvania.

The second case – *Gorsline v. Bd. of Supervisors of Fairfield Twp.*, Dkt. No. 67-MAP-2016 – challenges whether a local township properly granted a conditional use permit under the township’s local zoning code to allow a natural gas company to install a well in a residential zoning district. The local zoning code allows for the construction of “public service” facilities in the residential district, and the township granted the conditional use permit on that basis. A group of local residents who opposed the permit sued to overturn the township’s grant of the permit. The trial court in Lycoming County agreed with the local residents, and reversed the township’s grant of the conditional use permit. The Commonwealth Court overturned the trial court decision, holding that the natural gas well was “similar” to a public service facility, which was expressly allowed in the residential district. The local residents have appealed to the Supreme Court, and

arguments will likely be heard early this year. The ultimate decision in this case will mold the law on whether private natural gas development could be considered a “public” facility for local zoning exemptions throughout the state.

The final case – *Pa. Env'tl. Def. Fund v. Commonwealth*, Dkt. No. 10-MAP-2015 – challenges the Commonwealth’s leasing of state forest land for natural gas exploration. A citizen group opposing the leasing filed an action for declaratory relief, arguing that the leasing was contrary to the Environmental Rights Amendment contained in Article 1, Section 27 of Pennsylvania’s Constitution. In January 2015, an en banc panel of the Commonwealth Court ruled that the Environmental Rights Amendment did not restrict what the state could do with funds generated from leasing public land. In arriving at this holding, the Commonwealth Court reviewed the Pennsylvania Supreme Court’s *Robinson Twp.* decision, which was a plurality, rather than a majority decision, declared that it was not binding precedent, and instead applied the so-called *Payne v. Kassab* test to evaluate the constitutional issues in the case. Pennsylvania’s Environmental Rights Act Amendment is front and center in the Supreme Court appeal, and the case is expected to generate an opinion that will clarify how the Amendment should be applied.

Pennsylvania to “Clear the Air” in 2017

Darryl D. Borrelli, Senior Technical Consultant

A change to Pennsylvania’s program guidance for the Land Recycling Program (a/k/a “Act 2”) occurred in early 2017 when the new Vapor Intrusion Guidance document became operable on January 18. The new document provides a vast amount of additional detail and flexibility, as compared to the current vapor intrusion guidance document, on the collection and evaluation of environmental samples containing volatile organic compounds (“VOCs”). Environmental samples will be able to be screened and evaluated using simple look up tables or by conducting a more site-specific evaluation. A much more detailed evaluation of potential preferential pathways for vapor intrusion is also required by the new guidance.

In addition, the Pennsylvania Department of Environmental Protection (“PADEP”) is working on a complete update and revision to other sections of the Act 2 Technical Guidance Manual. A revised document is expected to be available later in 2017. One area that is receiving significant focus relates to assessing the presence and potential for recovery of petroleum product releases. PADEP’s new guidance on this issue is expected to reflect recent national trends, which provide for a critical evaluation of petroleum mobility and the practicality of performing actions to recover petroleum product. The new document is also expected to address the current disconnect in PADEP’s guidance related to the requirement to recover petroleum contamination whose source was a regulated storage tank “to the maximum extent practicable,” while product whose source is not a regulated tank may be managed in-place.

Update on the Management of Fill Policy

Michael M. Meloy, Esq.

In terms of ramifications for the regulated community, few if any technical guidance documents issued by the Pennsylvania Department of Environmental Protection (“PADEP”) rival in importance the Management of Fill Policy (also referred to as the Clean Fill Policy). The Management of Fill Policy establishes guidelines for delineating between fill material that can be used as unregulated “clean fill” and fill material that instead must be managed as a waste under the Pennsylvania Solid Waste Management Act

("SWMA"), 35 P.S. §§ 6018.101 – 6018.1003. The current version of the Management of Fill Policy was issued in 2004 and was slightly revised in 2010.

On December 20, 2014, PADEP issued significant proposed changes to the Management of Fill Policy for public comment. The proposed changes focused predominantly on modifying the numeric standards that are used to help determine whether fill material qualifies as "clean fill" or instead is regulated under the SWMA. The proposed changes also included modifications to the sampling and analytical protocols contained in the Management of Fill Policy. The proposed changes sparked significant public comment during the public comment period that closed on February 18, 2015.

The numeric standards in the Management of Fill Policy are generally based on the direct contact numeric values and generic soil-to-groundwater numeric values developed by PADEP to implement the statewide health cleanup standard under the Pennsylvania Land Recycling and Environmental Remediation Standards Act ("Act 2"), 35 P.S. §§ 6026.101 – 6026.908, for soils at residential properties overlying used aquifers. Since these standards were adopted in 2004, the numeric values under Act 2 have been amended on multiple occasions. The most recent amendments took effect on August 27, 2016.

PADEP has indicated that it plans to proceed with revisions to the Management of Fill Policy to take into account the most recent modifications to the cleanup standards under Act 2. If PADEP embraces the approach that it used in 2004, a number of the numeric standards for "clean fill" will decrease significantly. In certain instances, the new "clean fill" standards will drop to below background levels for commonly occurring regulated substances including benzo(a)pyrene and vanadium. As part of public comments regarding the proposed changes to the Management of Fill Policy, Manko, Gold, Katcher & Fox has emphasized the importance of developing options to address default background levels for various regulated substances that might be higher than the new "clean fill" standards to avoid the significant problems that will be created without such a "safety valve."

In addition, PADEP seems to have given little thought to the major legal issues that will be triggered by imposing new and more restrictive numeric standards on fill material. For example, such changes will necessarily place into question the status of fill material that was used in accordance with the current numeric standards but which might not qualify as "clean fill" under the new numeric standards. Likewise, the status of fill material that has been acquired in reliance on the current clean fill standards but may not be used by the time the new standards take effect will need to be resolved.

PADEP has suggested that it may decide to propose additional changes to the Management of Fill Policy beyond those identified in late 2014 and reissue the updated version of the Management of Fill Policy for further public comment. These developments are likely to unfold in the coming months and will be critically important to anyone involved in excavating, moving, placing, or otherwise handling soils and other types of fill material in Pennsylvania.

Proposed Changes to Chapter 245 Regulations for Storage Tanks

William E. Hitchcock, Technical Consultant

At the December 6, 2016 meeting of the Storage Tank Advisory Committee ("STAC"), the Pennsylvania Department of Environmental Protection ("PADEP") presented draft changes to the Chapter 245 regulations governing administration of the Storage Tank and Spill Prevention Program, and distributed

drafts of technical guidance documents describing closure requirements for aboveground and underground storage tank systems. Many of the proposed changes to these programs were prompted by EPA's July 2015 revisions to the federal storage tank regulations, which must be implemented at the state level within three years.

Substantive changes are proposed to the Chapter 245 regulations, including periodic operation and maintenance requirements for Underground Storage Tank ("UST") systems, periodic inspection requirements, changes to the types of acceptable overfill prevention devices, new secondary containment requirements, requirements to ensure system compatibility with alternative and biofuel blends, training requirements for tank operators, a new level of certification for tank inspectors, and additional reporting and recordkeeping requirements for tank inspections. The proposed regulations will also apply to emergency generator USTs, which were previously deferred from regulation under the state and federal programs. Many of the new requirements have a one-year "phase-in" period to allow the regulated community some time to bring existing tank systems into compliance. PADEP intends to begin the public comment period for these proposed changes by the end of 2017. The current draft documents can be accessed using the links below:

- [Draft proposed rulemaking to revise Chapter 245 \(Administration of the Storage Tank and Spill Prevention Program\)](#)
- [Draft technical guidance "Closure Requirements for Aboveground Storage Tank Systems"](#)
- [Draft technical guidance "Closure Requirements for Underground Storage Tank Systems"](#)

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